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IN THE

Supreme Court of the United States

October Term, 1968

No. 1274

W. T. SMITH,
Petitioner,

vs.

A. P. STOUTOMIRE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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ALABAMA PRINTERS, INC., MONTGOMERY, ALABAMA

INDEX

		Page
Opinions Below		2
Jurisdiction		2
Questions Presented		2
Constitutional Provisions Involved		2
Statement		3
Reasons for Granting the Writ		6
Conclusion		12
Certificate of Service		12
Appendix (A)	Constitutional Provisions, Statutes, and Rules	A1
Appendix (B)	(1) Judgment of Alabama Supreme Court	B1
	(2) Decrees of the Circuit Court of Mobile County, Alabama	B8

TABLE OF AUTHORITIES

CASES

Page

Barr v. Columbia, 378 U.S. 146, 149 84 S.Ct. 1734 7

Bolton v. Barnett Lumber & Supply Co., 267, Ala. 74, 100 So.2d 9 8

Brooks v. Everett, 271 Ala. 380, 124 So.2d 100 8

Central Land Co. v. Laidley, 159 U.S. 103, 16 S.Ct. 80 7

City of Montgomery v. Mott, 266 Ala. 422, 96 So.2d 766 8

Davis v. Wechsler, 263 U.S. 22, 44 S.Ct. 13 (1923) 7

EX PARTE Virginia, 100 U.S. 339 11

Garner v. Louisiana, 368 U.S. 157 (1961) 11

Henderson v. Mayor of New York, 92 U.S. 259 12

Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459 7

Local Loan Co. v. Hunt, 292 U.S. 234, 54 S.Ct. 695 (1934) 9

Mooney v. Holohan, 294 U.S. 103 12

N.A.A.C.P. v. Alabama Ex Rel Flowers, 377 U.S. 288, 84 S.Ct. 1302 (1964) 6, 7, 9

N.A.A.C.P. v. Alabama Ex Rel Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2L.Ed. 2d 1499 7

Personal Industrial Loan Corp. v. Forgay, 240 F.2d 18 cert den (1957) 354 U.S. 922, 77 S.Ct. 1380 10

Quinn v. Hannon, 262 Ala. 630, 80 So.2d 239 9

Roger v. Alabama, 192 U.S. 226 12

Shuttlesworth v. Birmingham, 376, U.S. 339, 84 S.Ct. 795 7

Stariha v. Hagood, 252 Ala. 158, 40 So.2d 85 9

Staub v. City of Boxley, 355 U.S. 313, 78 S.Ct. 277 (1958) 7

Strauder v. West Virginia, 100 U.S. 303 (1879) 11

Thompson v. City of Louisville, et al., 362 U.S. 199 11

Thompson v. State, 267 Ala. 22, 99 So.2d 239 9

Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10L. Ed. 2d 349 7

Yick Wo. v. Hopkins, 118 U.S. 356 (1886) 11

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

Page

Fourteenth Amendment A1

Code of Alabama, 1940 Appendix to Title 7 .
Alabama Supreme Court Rules of Practice,
Rule 9 ..... A1

IN THE

Supreme Court of the United States

October Term, 1968

No. .....

W. T. SMITH,
Petitioner,

vs.

A. P. STOUTOMIRE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

1

Petitioner herein respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Alabama entered on November 21, 1968, which affirmed a $4,919 judgment for punitive damages entered on October 26, 1967, in the Circuit Court of Mobile County, Alabama against petitioner, in a suit for an alleged fraud and misrepresentation based on an oral agreement to construct a house for Respondent.

Opinions Below

The opinion of the Supreme Court of Alabama in SMITH v. STOUTOMIRE, is reported at ..... Ala. ..... So.2d, and is set forth in Appendix B, infra, pp. ..... The opinion of the Circuit Court of Mobile County, Alabama is also printed in Appendix B, infra, pp. .....

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on November 21, 1968. The jurisdiction of this Court is based on 28 U. S. C. § 1257(3), petitioner having alleged below, and alleged herein the denial of due process, deprivation of rights, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Whether the Alabama Supreme Court may invoke procedural requirements which are not regularly followed so as to thwart review in the Supreme Court of the United States and deprive petitioner of constitutionally protected rights?

2. Whether the right of the petitioner to due process as guaranteed by the Fourteenth Amendment is violated by affirmance of a judgment by the Alabama Supreme Court which makes ineffective the purpose and intent of the Federal Bankruptcy Statute, and which permits employees of a Bankrupt to be sued on the alleged ground that bankrupt employees committed fraud upon respondent along with the bankrupt?

Constitutional Provisions Involved

This case involves Section I of the Fourteenth

Amendment to the Constitution of the United States.

Statement

The Respondent, A. P. STOUTOMIRE, instituted suit seeking damages in the amount of Ten Thousand Dollars ($10,000) against Ferrell Construction Company, a corporation and the XYZ Co., a corporation, a sole proprietorship, whose name is otherwise unknown and which will be added by amendment when ascertained and W. T. Smith, Perry Coleman, and William L. Ferrell, jointly and individually.

Ferrell Construction Company was an unincorporated business owned by William L. Ferrell. W. T Smith, the petitioner herein, a seventy-year-old minister, was employed part-time as a salesman as was one Perry Coleman, a defendant below and the petitioner, W T. Smith, were given titles as Vice-president and Secretary-treasurer respectively by William L. Ferrell, who was in fact the owner and President of Ferrell Construction Company.

During late June or early July of 1965, Respondent Stoutomire had a conference with William L. Ferrell. At that time an oral agreement was entered into between respondent and Ferrell to build a house for respondent for an agreed consideration of $17,500.00. In furtherance of said agreement, respondent paid to William L. Ferrell on August 13, 1965, $500 deposit as a partial down payment.

The evidence is undisputed that William L. Ferrell the respondent, as well as all other amount purportedly paid by respondent.

At the trial respondent offered evidence to show that petitioner W. T. Smith, received $250 on November 30. 1965 and One Hundred Dollars on November 20, thereafter received personally One Hundred Dollars from the respondent, as well as all other amounts purportedly

paid by respondent. At the trial respondent offered evidence to show that petitioner had reecived $250.00 on November 30, 1965, and One Hundred Dollars on November 20, 1965. Petitioner testified that he had never received any money from the respondent and that the receipt bearing his signature had been forged. Several months before the suit was brought by the respondent, Ferrell Construction Company and William L. Ferrell were adjudicated bankrupts, and thereafter Ferrell was convicted and sentenced to prison for forgery.

Evidence indicated that William L. Ferrell had placed Perry Coleman and W. T. Smith on salary and that his Company was indebted to both Coleman, Smith, and other employees when the business became insolvent.

Respondent joined Perry Coleman and petitioner W. T. Smith as co-defendants in his suit for damages on the grounds that each were officers of the Ferrell Construction Company when said business became bankrupt and by virtue of the association of the parties, each defendant was guilty of false and fraudulent representation. Respondent also claimed that the defendants below knew that the representation made to him were false at the time they were made and had no intentions of carrying them out. Respondent failed to introduce evidence of either an oral or written contract between himself, Coleman and the petitioner herein.

Respondent also claimed an equity credit of $300.00 against defendants below for an automobile, which he sought to sell to another employee of Ferrell Construction Company, but which did not result because respondent was delinquent in note payments on the automobile in question and the finance company would not permit respondent to transfer title to another party without their approval. Several other witnesses testified that claims had been filed against the bankrupt Ferrell Construction Company and William L. Ferrell, but had received no part of their loss as of the date of the trial of this cause.

By claiming that Perry Coleman and petitioner were confederates with William L. Ferrell and alleging fraud and misrepresentation, respondent sought to obviate the purpose and intent of the Bankruptcy Statute and obtain damages from others who had never made any promises to him and who were in no wise obligated to him on other grounds.

Respondent also claimed $1,000 damages for conversion, although the respondent still had title and exclusive possession of the 1961 LeSabre Buick automobile on the day of the trial of the cause and testified to this fact.[1]

As an additional item of damage, respondent claimed that the bankrupt Ferrell Construction Company was indebted to him for work and labor in the amount of $355.00.

After filing suit against defendants below, respondent filed an amendment to his complaint by adding Count 5 claiming $5,000 damages for fraud, deceit and misrepresentation (later amended to increase damages to $10,000). On October 26, 1967 a jury awarded damages in favor of the respondent in the amount of $4,919.00.

On October 31, 1967, an appeal from the judgment of the Circuit Court of Mobile County, Alabama was taken only by petitioner W. T. Smith to the Supreme Court of Alabama, with the assistance of church members and friends serving as surety on his behalf, and whose property is presently in the process of being sold, pending the determination of this petition for Certiorari from the judgment of the Alabama Supreme Court affirming the judgment below. Having no tangible assets of any description, Perry Coleman and William L. Ferrell

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[1] Record of trial proceeding, p. .....

did not perfect appeal to the Alabama Supreme Court or join in this petition.

On November 21, 1968, the Alabama Supreme Court affirmed the judgment of the trial court, without considering appellant's Assignments of Error because of so-called procedural defects. The Alabama Supreme Court held in effect that petitioner had not observed procedural rules and because of this defect, the Court claimed it could not consider assigned errors.

On December 2, 1968, petitioner moved for a rehearing and submitted a brief in support thereof The Alabama Supreme Court summarily denied the petition for rehearing without an opinion on January 16, 1969, and the petitioner being unable financially to post a supersedeas bond has nevertheless filed the petition herein.

Reasons for Granting the Writ

This petition presents two serious and substantial issues involving a subtle denial of substantive and procedural due process of law by the Alabama Supreme Court in violation of the Fourteenth Amendment to the Constitution of the United States. Fundamentally, the effect of the present affirmance by the Alabama Supreme Court could effectively thwart review of the present petition even though petitioner has complied with procedural rules, not only in form, but also in substance. By a simple recitation in its opinion that petitioner had failed to observe the procedural rules of the Alabama Supreme Court and because of this defect, the Court was prevented from a consideration of Errors assigned by petitioner. This practice of the Alabama Supreme Court is apparently now well-known by this Court. In **N.A.A.C.P. v. Alabama,** 377 U.S. 296, 84 S.Ct. 1302, 1308 (1964), this Court stated:

"The Consideration of asserted constitu-

> tional rights may not be thwarted by a simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form in every real sense."

In **Davis v. Wechsler,** 263 U.S. 22, 44 S.Ct. 13, (1923) this Court held that it would not contenance as final the decision of a state tribunal as to what are the facts alleged to give rise to a federal right, or to bar the assertion on local grounds; and that local practice will not be allowed to defeat or to unreasonably hinder the assertion of federal rights.

Whether a state court by putting forward non-federal grounds of decision which are without fair or substantial support, so as to preclude rights under the federal constitution has also been considered by this Court and was answered in **Staub v. City of Boxley,** 355 U.S. 313, 78 S.Ct. 277 (1958).

In **Barr v. Columbia,** 378 U.S. 146, 149, 84 S.Ct. 1734, 1736 this Court stated:

> "We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review. See e.g., **N.A.A.C.P. v. Alabama** ex rel Flowers, 377 U.S. 288, 84 S.Ct. 1302; **Shuttlesworth v. Birmingham,** 376 U.S. 339, 84 S.Ct. 795, 11 L.Ed.2d 766; **Wright v. Georgia,** 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349; **N.A.A.C.P. v. Alabama** ex rel Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1499."

Unconstitutional decisions of state courts should be restrained, **Central Land Co. v. Laidley,** 159 U.S. 103, 16 S.Ct. 80, and wrong judgments corrected, **Herb v. Pitcairn,** 324 U.S. 117, 65 S.Ct. 459.

The severity of the decision by the Alabama Supreme Court becomes suspect, particularly where Rule 9 as promulgated by the Alabama Supreme Court states that the rule in question is directory. The Court from the time of its adoption has exercised its discretion in the consideration of briefs which fairly and helpfully make the points upon which the petitioner relies.

Indicative of the "mere directory" aspect of the rule, the Alabama Supreme Court in **Bolton v. Barnett Lumber and Supply Co.,** 267 Ala. 74, 100 So.2d 9, held that its rules governing the form of an appellant's brief is directory. Again, in **City of Montgomery v. Mott,** 266 Ala. 422, 96 So.2d 766, there were 25 assignments of error, none of which were numbered in the appellant's brief and the Alabama Supreme Court said that appellant's brief did not strictly conform with the rules governing the form and contents of appellant's brief, but that it did not feel that the defects in the brief warranted a dismissal of the appeal.

The Alabama Supreme Court also stated in the above cited case that:

> "We have condoned noncompliance with the rule in question when the record is short and simple and when a strict compliance with the rule is not essential to an understanding of the assignments of error which are argued in appellant's brief."

In **Brooks v. Everett,** 271 Ala. 380, 124 So.2d 100, the Alabama Supreme Court considered assignments of error although there were 38 of them and none had been specifically referred to in appellant's brief. The Court said:

> ". . . (w)e have held that although appellant's brief does not comply with the rules of

> this court, if it fairly and helpfully makes the points upon which the appellant relies, this court may in its discretion, consider those points on their merit." **Ibid.**

See also **Stariha v. Hagood,** 352 Ala. 158, 162, 40 So.2d 85, 89; **Quinn v. Hannon,** 262 Ala. 630, 632, 80 So.2d 239, 241; **Thompson v. State,** 267 Ala. 22, 99 So.2d 148.

In view of the long history of the Alabama Supreme Court's abuse of its discretion, which has permitted the Court to consider assigned errors in one case and refuse to do so in other cases, this Court in **N.A.A.C.P. v. Alabama,** 377 U.S. 288 at 301, 84 S.Ct. 1302 at 1310 stated:

> "In sum, we think that what we said when this litigation was first here, with respect to the procedural point there asserted as a state ground of decision adequate to bar review of the merits also fits the present situation."
>
> "Novelty in procedural requirement cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 357 U.S., at 457-458, 78 S.Ct., p. 1169.

Respondent's effort to avoid process against Perry Coleman and the petitioner W. T. Smith as authorized by Section 18 of the Bankruptcy Act became manifest by his act of instituting suit in a state court instead of pursuing his remedy in the Bankruptcy Court. **Local Loan Co v. Hunt,** 292 U.S. 234, 54 S.Ct. 695 (1934), which established the rule that a creditor's suit to collect after discharge could be restrained. The bankruptcy court had ancillary jurisdiction to preserve the advantages of its judgment of discharge as to William L. Ferrell and Ferrell Construction Company. If it can be assumed that Ferrell

Construction Company was a **de facto** corporation, then its obligation, nevertheless, would be discharged as to the petitioner, W. T. Smith and the other defendants below as purported officers of Ferrell Construction.

Petitioner was merely an employee of Ferrell Construction Company as the evidence reveals, and had not been guilty of fraudulent behavior as alleged by the respondent.

In **Personal Industrial Loan Corp. v. Forgay,** 240 F.2d 18 cert den (1957), 354 U.S. 922, 77 S.Ct. 1380, the Tenth Circuit stated:

> ". . . (T)he bankruptcy court has the power to effectuate the adjudication and order made by the Court in a bankruptcy proceeding. This power is a continuing power and may be invoked after order of discharge and after termination of the bankruptcy proceeding in the bankruptcy court. The court has a continuing duty and solicitude to see that a discharged bankrupt is not unduly denied the benefits of his adjudication and discharge."

If it were assumed that Perry Coleman and petitioner W. T. Smith were partners with William L. Ferrell as asserted by the respondent, Section 18 of the Bankruptcy Act required service to be made upon all partners not parties to the filing of the voluntary bankrupt petition. The verified petition of the bankrupt William L. Ferrell indicated that Ferrell Construction Company was owned by him in his private capacity. Any obligation to respondent by Ferrell Construction Company and William L. Ferrell should not have involved an employee in petitioner's position so as to adversely affect his property rights in violation of the guarantees and protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The provisions of Section 96 of the National Bankruptcy Act provides to the contrary notwithstanding, that statutory liens in favor of employees or former employees such as the Respondent and others shall be perfected by filing notice thereof in the bankruptcy court so as to preserve their claim.

If this case stands unreviewed and unreversed, not only will the protection of property rights be impeded, but the Alabama Supreme Court will have been given permission to place a curtain of silence over erroneous verdicts and judgments in violation of the due process clause of the Fourteenth Amendment. **Thompson v. City of Louisville, et al.**, 362 U.S. 199.

As stated above, the Supreme Court of Alabama seeks to resort to absurd procedural technicalities as a basis of ignoring rights of the petitioner to due process in the Courts of the State of Alabama.

As this Court said in **Yick Wo. v. Hopkins,** 118 U.S. 356 (1886):

> "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . ."

The Constitution prohibits discrimination by states as announced in **Ex Parte Virginia,** 100 U.S. 339: **Strauder v. West Virginia,** 100 U.S. 303 (1879), to **Garner v. Louisiana,** 368 U.S. 157 (1961), and **Thompson v. City of Louisville,** et al, 362 U.S. 199. The law is clear that such discrimination is equally repugnant whether it takes the

form of legislation or unequal administration of the law by public authority, including state trial and appellate courts. **Henderson v. Mayor of New York,** 92 U.S. 259; and **Mooney v. Holohan,** 294 U.S. 103 at page 113. As this Court said in **Rogers v. Alabama,** 192 U.S. 226, at page 230:

> "It is necessary and a well settled rule that the exercise of jurisdiction by this Court to protect Constitutional right cannot be declined when it is plain that the fair result of a decision is to deny the right."

Conclusion

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

This is to certify that two copies of the above and foregoing petition has been served on John L. Lawler, Esq., attorney for the respondent, at 902 Roberts Building, Box 1652, Mobile, Alabama 36602, via United States mail, postage prepaid this ..... day of April, 1969.

.....
Of Counsel

APPENDIX B

B1

(1) Opinion of the Supreme Court of Alabama:

THE STATE OF ALABAMA —

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1968-69

1 Div. 494

W. T. SMITH

v.

A. P. STOUTOMIRE

Appeal from Mobile Circuit Court

HARWOOD, **Justice**

The complaint in this case as originally filed contained four counts, and the defendants were designated in the caption as "Ferrell Construction Company, a corporation, a partnership, a sole proprietorship, whose name is otherwise unknown but which will be added by amendment when ascertained, and W. T. Smith and Perry Coleman and William L. Ferrell, jointly and individually."

The defendants' demurrer to the complaint was sustained. The complaint was then amended by changing the caption to designate the defendants as "Ferrell Construction Company, a corporation, and the X Y Z Company, a corporation, a partnership or sole proprietorship, whose name is otherwise unknown but which will be added by amendment when ascertained, and W. T. Smith

and Perrp Coleman and William L. Ferrell, jointly and individually."

All other allegations of the complaint were re-adopted.

The complaint was further amended by adding Count 5, claiming $5,000 damages for fraud, deceit, and misrepresentation (later amended to increase damages to $10,000).

Demurrers to the complaint as amended were overruled.

In his charge to the jury, the court eliminated Count 1, and the cause was submitted to the jury on Counts 2, 3, 4, and 5 of the complaint as amended.

Counts 2, 3, and 4 are in Code Form.

Count 2 claims $1,450 for monies received by the defendants for the use of the plaintiff.

Count 3 claims $355.00 for work and labor.

Count 4 claims $1,000 as damages for conversion of an automobile.

Count 5 sounds in fraud and misrepresentation in connection with an agreement for the construction of a house, and claims $1,450 in actual damages, and in addition claims punitive damages.

Upon the trial of this cause the jury returned a general verdict in favor of the plaintiff and fixed his damages at $4,919, and judgment was entered pursuant to the verdict.

Only the defendant W. T. Smith has perfected an appeal from said judgment.

At the threshold of this review we are confronted with appellees' motion, and argument in support thereof, to strike appellant's assignments of error, or in the alternative to affirm the trial court, because of deficiencies in said assignments. Several of the assignments of error are faulty in one or more aspects.

Assignment of Error 1 reads:

> "The court erred in refusing to sustain defendant's demurs (sic) to the complaint as amended. (Tr. p. 9)."

This assignment of error is to the complaint as a unit. The complaint contained five counts, claiming damages in different amounts and on separate and differing claims. Couts 2, 3, and 4 are in Code Form.

If separate consideration of each distinct unit of a pleading is sought, it is necessary to assign as error the ruling in respect to each unit.

Counts 2, 3, and 4 being common counts in Code Form, the demurrer was properly overruled as to these counts. This being so, the single assignment of error going to the complaint as a whole cannot be upheld. **Lonnie Russell Ford, Inc. v. Mitchell,** 279 Ala. 340, 185 So. 2d 132; **Central of Georgia Ry. Co. v. Hinson,** 262 Ala. 223, 78 So. 2d 286.

Assignment of Error 2 is quite lengthy. It starts off stating the case, contains conclusions from the evidence, refers to a failure to comply with the building code of the City of Mobile, and asserts lack of privity between the plaintiff and defendants, and cites Section 10, Title 57, Code of Alabama 1940 (Statute of Frauds), quotes from the testimony of the plaintiff on cross examination, and asserts that, "Mrs. Glover declined to sell 26 feet frontage desired by Stoutomire (T. p. 61), which

prevented the carrying out of the contract at the time."

Assignment of Error 3 is likewise quite lengthy. It apparantly complains of the court's rulings during the testimony of several witnesses, and recites that the court "committed reversible error in that the trial court exercised its discretion in allowing outside witnesses (naming three) to come into the case which they have no interest in one way or the other * * * based on **Roan v. Smith,** 133 So. 2d 244 * * *" (Par. ours.)

Both Assignment of Error 2 and Assignment of Error 3 are confusing, indefinite, and uncertain. They are argumentative, and attempt to assert various alleged errors in a general way. Certainly they fail to particularize any specific error relied on. These defects prevent our consideration of these assignments. **Anderson v. Smith,** 274 Ala. 302, 148 So. 2d 243; **First National Bank of Birmingham, etc. v. St. Clair County,** 272 Ala. 247, 130 So. 2d 378; **Alabama Public Service Commission v. Mobile Gas Co.,** 213 Ala. 50, 104 So. 2d. 538.

Assignment of Error 6 is based upon an excerpt from the testimony of the plaintiff on direct examination. This excerpt shows that no objections were interposed to any of this testimony.

Only adverse rulings of the trial court are subject to assignment of error on appeal from a judgment in a civil case. **Dudley Bros. Lumber Co. v. Long, etc.,** 268 Ala. 565, 109 So. 2d 684; **Morris v. Yancey,** 267 Ala. 657, 104 So. 2d 553.

Assignment of Error 7 seeks to assert that the court "disregarded" the Statute of Frauds as provided in Section 10, Title 57, Code of Alabama 1940.

The assignment is probably faulty, but regardless, the defendant filed only two pleas both being the gen-

eral issue. The Statute of Frauds not being specially pleaded, and it not appearing from the face of the complaint that the Statute was violated, the defense of the Statute of Frauds is considered waived, not being available under a plea of the general issue. **Smith v. Pritchett,** 98 Ala. 649, 13 So. 569; **Johnson v. Deloney,** 241 Ala. 16, 1 So. 2d 11.

Assignment of Error 5 reads:

> "The court charged punitive damages, and such damages are not proper in this case. The evidence doesn't support same and the court committed reversible error charging the jury as it did that they may return a verdict with punitive damages."

This assignment does not disclose that an exception was taken to the oral charge of the court, nor the terms of such exception if taken, that is, whether any sufficient exception was or was not reserved. Error, if any, would spring from the terms and sufficiency of the exception taken, and the court's ruling thereon. As stated in **Morris v. Yancey,** 267 Ala. 657, 104 So. 2d 553:

> "This court has repeatedly held that only adverse rulings are subject to an assignment of error on appeal from a judgment in a civil case based on a jury verdict." (Numerous citations omitted.)

We further note that the instructions of the court relative to punitive damages pertained to Count 5, which claimed punitive damages because of fraud and misrepresentation.

> "It is no longer subject to question that punitive damages are allowed in this state in fraud cases where the defendant has made false

> representations intended to defraud the plaintiff." **J. Truett Payne Motor Co. v. Jackson,** 281 Ala. 426, 203 So. 2d 443.

The evidence warranted the submission to the jury the question of fraud on the part of the defendants, and the court's oral instructions in this aspect were full, fair, and correct.

The Fourth Assignment of Error pertains to the action of the court in denying appellant's motion for a new trial on the ground that the damages were excessive, and in denying a subsequent specific motion for a remittitur.

The record shows that the verdict was rendered and judgment was entered on 26 October 1967.

On 31 October 1967, written notice of appeal was filed, and on 6 November 1967, security of costs for appeal (appeal bond) was filed. Citation of Appeal was issued on 10 November 1967, and was served on 14 November 1967. On 14 November 1967, the Clerk of the Circuit Court of Mobile County issued a Certificate of Appeal, which was filed in this court on 14 November 1967.

Thereafter, on 17 November 1967, the appellant filed his motion for a new trial, alleging among other grounds excessiveness of damages. This motion also contained a prayer for a remittitur of damages. At the same time appellant filed a supersedeas bond. This motion was continued and set for hearing on 24 November 1967, and on that date was heard and taken under consideration. On 18 December 1967, the court entered an order denying the motion, setting forth, as to this appellant:

> "The defendant, W. T. Smith having perfected his appeal of this case prior to filing

his motion for a new trial, this court has no jurisdiction to entertain to entertain and no power to rule on his Motion for a New Trial. **Hudson v. Bauer Grocery Co.,** 105 Ala. 200 (211); **Robinson v. Morrison,** 272 Ala. 552 (561); **United Insurance Company of America v. Powers,** 279 Ala. 410 (413).

* * *

"Now, therefore, it is ordered and adjudged by the Court that the Motion for a New Trial filed by the Defendant, W. T. Smith, is coram non judice and void."

The authorities cited by the lower court fully support the action taken in the premises.

On 27 December 1967, the appellant filed a "Petition for Leave to File a Motion for a Remittitur." On 29 December 1967, the court entered an order to the same effect as that entered on the motion for a new trial. This action was correct under the authorities cited in the order of the court relative to the motion for a new trial.

AFFIRMED.

Livingston, C. J., Lawson and Merrill, J. J., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 21 day of November, 1968.

J. O. Sentell
Clerk, Supreme Court of Alabama

Decree of the Circuit Court of Mobile County, Alabama Jury and Verdict for Plaintiff for $4,919.00

THURSDAY, OCTOBER 26, 1967

This day in open Court came the parties with their attorneys, and this cause coming on to be heard and issue having been joined between plaintiff and defendants, and this cause having been regularly set for trial for this day, thereupon, in open Court on this day, in the presence of both the parties, with their attorneys, came a jury of good and lawful men, to-wit: James E. Quint, and eleven others, who, having been first duly empanelled and sworn, according to law, and who, having heard the evidence and the charge of the Court, upon their oaths, in open Court on this day in the presence of plaintiff, defendants and their attorneys, do say: "We, the Jury, find for the Plaintiff and against the Defendants and assess his damages at $4,919.00."

It is, therefore, ordered and adjudged by the Court that plaintiff do have and recover of defendants the sum of Four Thousand Nine Hundred Nineteen and 00/100 ($4,919.00) Dollars, the amount of damages as so assessed by the Jury, and all court costs in this cause created, for recovery of which, let execution issue.

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CIVIL DIVISION
No. 18,788

A. P. STOUTOMIRE,

Plaintiff,

v.

FERRELL CONSTRUCTION CO., a corporation and the XYZ CO., a corporation, a sole proprietorship, whose name is other wise unknown but which will be added

by amendment when ascertained, and W. T. SMITH and PERRY COLEMAN and WILLIAM L. FERRELL, jointly and individually,

Defendants.

OPINION AND ORDER

The Defendant, W. T. Smith, having perfected his appeal of this case prior to filing his Motion for New Trial, this Court has no jurisdiction to entertain and no power to rule on his Motion for New Trial.

Hudson v. Bauer Grocery Co.
105 Ala. 200 (211)

Robinson v. Morrison
272 Ala. 552 (561)

United Insurance Company of America v. Pounders, 279 Ala. 410 (413)

The effect of the appeal by the Defendant, W. T. Smith, on the Motion for New Trial filed by his co-Defendant, Perry Coleman, is no so clear. No case involving this situation between co-Defendants has been found in the decisions of the Appellate Courts of Alabama. While it would seem harsh to allow one Defendant, by filing a precipitate appeal to destroy the right of his co-Defendant to file and have the trial Court rule on a Motion for New Trial, yet, by following such procedure the case would be bifurcated to such an extent that it would be pending in two Courts at one and the same time, and could lead to two separate judgments in different amounts in the same case which would be an anomaly.

It is the opinion of this Court, therefore, that once an appeal is perfected by any Defendant, the entire cause

is thereby removed to the Appellate Court for all purposes (except for the limited jurisdiction in the Trial Court to enforce the judgment ,if there is no supersedeas; to correct the record and the like); and, therefore, the Trial Court has no jurisdiction to entertain and rule on a Motion for New Trial filed by a co-Defendant.

However, in order to avoid further delay in the matter in the event that this Court is mistaken in its opinion set out in the preceding paragraph; this Court has heard arguments on and has fully considered the Motion for New Trial filed by the Defendant, Perry Coleman, and is of the opinion that said Motion is due to be denied.

Now, therefore, it is ORDERED and ADJUDGED by the Court that the Motion for New Trial filed by the Defendant, W. T. Smith, is coram non judice and therefore void; and

It is further ORDEDER and ADJUDGED by the Court that the Motion for New Trial filed by the Defendant, Perry Coleman, be and the same hereby is DENIED.

Dated at Mobile, Alabama this 18th day of December, 1967.

/s/ WILL G. CAFFEY, JR.
Will G. Caffey, Jr.
Judge

Order, Motion of W. T. Smith for leave to file Motion for Remittitur, Declared Void

FRIDAY, DECEMBER 29, 1967

The Defendant W. T. Smith, having heretofore perfected his appeal of the case prior to filing his motion to allow him to file a motion for a Remittitur, the Court

has no jurisdiction to entertain and no power to rule on said motion;

Now, therefore, it is Ordered and Adjudged by the Court that the motion filed by this defendant, W. T. Smith, to allow him to file a motion for a Remittitur, is coram non judice and therefore void.

Dated at Mobile, Alabama this the 29th day of December, 1967.

WILL G. CAFFEY, JR., JUDGE